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No. 17-333

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In The

Supreme Court of the United States

O. JOHN BENISEK, *et al.*,

Appellants,

v.

LINDA H. LAMONE, *et al.*,

Appellees.

On Appeal From The United States District Court for The District of Maryland

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Did the three-judge district court act within its discretion when it denied plaintiffs' motion for preliminary injunction seeking to enjoin Maryland's 2011 congressional redistricting law because the plaintiffs failed to provide sufficient evidence that the redistricting caused them any injury?

2. Is the legal claim articulated by the three-judge district court unmanageable and therefore non-justiciable?

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MOTION TO AFFIRM

Appellees, defendants below, Linda H. Lamone, Maryland's State Administrator of Elections, and David J. McManus, Jr., Chair, State Board of Elections, respectfully move to affirm the three-judge district court's denial of plaintiffs' motion for preliminary injunction filed 3½ years after the case commenced. In declining plaintiffs' request to enjoin preliminarily Maryland's redistricting statute, enacted in 2011 and approved by voters in a 2012 referendum, the court did not abuse its discretion by concluding that such extraordinary relief is unwarranted because the record does not contain evidence sufficient to support a finding that plaintiffs are likely to succeed on the merits of their claim.

STATEMENT

1. This appeal arises from one of several challenges to the redistricting plan that the Maryland legislature enacted in 2011 to satisfy the constitutional requirement that congressional districts be reapportioned to achieve exact population equality in light of the 2010 decennial census. 2011 Md. Laws, Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701 – 8-709 (2014 Supp.). In June 2012, this Court summarily affirmed a three-judge district court's decision upholding the plan and rejecting a challenge that included both racial gerrymandering and partisan gerrymandering claims. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). In

Fletcher, the three-judge court rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 903-04. Other challenges to the 2011 plan have also been rejected. *See Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012).

2. The 2011 plan eliminated a significant geographic anomaly exhibited by Maryland's 1991 and 2002 congressional redistricting plans. Since 1991, Maryland's First District had contained portions of both the Eastern and Western shores of the Chesapeake Bay, separated by no less than four miles of water and connected only by the Chesapeake Bay Bridge. This bizarre configuration was the result of an incumbent-protection effort in the 1991 redistricting cycle intended "to accommodate the desires of U.S. Representative Bentley," a Republican, who sought to have "'a district she believed she could win [in] the next election.'" *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (Niemeyer, J., dissenting). To eliminate the Bay Bridge crossing, the 2011 plan extended the northern portion of the First District westward into precincts formerly contained within the Sixth District. The 2011 plan also responded to a request from the Maryland Legislative Black Caucus to reduce from three to two the number of districts in Prince George's County,

Fletcher, 831 F. Supp. 2d at 902, a change that required shifts in population in the Fourth District and the Eighth District, which borders the Sixth District. The 2011 plan also retained the two Maryland § 2 Voting Rights Act districts, the Seventh District and the Fourth District, as majority-minority districts, which necessitated shifts elsewhere to accommodate population changes in those districts.

These decisions caused shifts in the boundary of the Sixth District, which lost population to the First District and had to be realigned with the bordering Eighth District to accommodate changes in the Fourth District. When drawing the Sixth and Eighth Districts, Maryland decisionmakers, including the Governor, the Speaker of the House, and the Senate President, sought to keep intact a corridor along I-270, an area of Maryland experiencing rapid population growth because of the expansion of the Washington, D.C. suburbs and the biotech industry in Frederick City. Dkt. 186-1, 20 (collecting evidence). In addition to these various decisions impacting the configuration of the Sixth District, Governor O'Malley acknowledged that, "all things being legal and equal," Dkt. 186-2, 47:3, he was looking for a map that would "make it more likely rather than less likely that a Democrat . . . is able to prevail in the general election." Dkt. 186-2, 43:7.

The final map was the culmination of a months-long process of public hearings, consideration of third-party drafts, and drafting work undertaken by staffers. Dkt. 104, ¶¶ 18-23, 26; Dkt. 186-2, 53:12-54:7. Maryland's congressional delegation created draft maps for

submission to Maryland state decisionmakers with the help of a consultant, but there is no evidence that the consultant, Eric Hawkins, drew the final map. J.S. App. 18a-19a. The final map differed from the congressional delegation's submission in important ways. Unlike the congressional delegation's plan, the map developed by staffers to the Maryland decisionmakers (1) kept intact Washington County and the cities of Hagerstown, Westminster, and Frederick (with the exception of an unintentional split at a fork in the road with zero population); (2) kept the number of districts in Prince George's County to just two by drawing the Third and the Eighth Districts so that they did not include population from Prince George's County; (3) kept the number of districts in Montgomery County to three by drawing the Fourth District so that it did not include population from Montgomery County; and (4) made the I-270 corridor a major feature of the Sixth District, connecting Frederick with Montgomery County. Dkt. 186-11, ¶¶ 8-9.

3. After its enactment, the congressional redistricting statute was petitioned to statewide referendum, and a sizable majority of voters approved the legislation in the November 2012 election. J.S. App. 8a. The plan won voters' support in areas throughout the State, with majorities favoring the plan in 22 of Maryland's 24 counties, including three of the five counties that, prior to the 2011 redistricting, were located wholly or partly within Maryland's Sixth

District.[1] Republican Congressman Roscoe Bartlett had won in those same three counties, Frederick, Allegany, and Washington, in every congressional general election since 1992.[2] The Sixth District, as reapportioned in the 2011 plan, has become the sole focus of plaintiffs' challenge, after multiple amendments of their complaint.

4. The plaintiffs, who now include seven self-identified Republicans who lived in Maryland's Sixth District under the former redistricting plan, first brought this action in November 2013, more than a year after the first election was held under the 2011 plan. The initial complaint, and the amended complaint they subsequently filed, did not include the First Amendment retaliation theory on which they now rely. No preliminary relief was sought in conjunction with the filing of the original complaint or the amended complaint. After this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (Dec. 8, 2015), the plaintiffs waited four months, until March 2016, before filing a second amended complaint, which for the first time set forth their First Amendment retaliation claim. J.S. 7 (acknowledging that plaintiffs' First Amendment retaliation claim was first "clarified"

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[1] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Sept. 8, 2017).

[2] *See* Congressional election results available at the State Board of Elections' website, http://www.elections.state.md.us/elections (last visited Sept. 8, 2017).

in a second amended complaint filed after remand from *Shapiro v. McManus*). Again, the plaintiffs did not accompany their second amended complaint with a request for preliminary injunction or other preliminary relief. As articulated in their second amended complaint, plaintiffs' revised challenge asserts that the drafters of the 2011 plan "purposefully and successfully flipped [District 6] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." J.S. App. 87a.

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. J.S. App. 80a-111a. Still, no request for preliminary relief followed that decision. Instead, the parties embarked upon discovery, a period that included (1) plaintiffs' requests for depositions of sitting legislators to take place during Maryland's 90-day legislative session (Dkt. No. 112-1, 15-16); (2) plaintiffs' notice of Rule 30(b)(6) deposition of corporate designee, which was quashed by the district court, there being no defendant that is a corporation (Dkt. No. 145, 2); and (3) plaintiffs' motion for sanctions, which was withdrawn by plaintiffs after it was fully briefed (Dkt. No. 164).

Near the same time that the parties completed seven months of fact and expert discovery, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on

the merits, or in the alternative, for summary judgment. J.S. App. 1a. During the pendency of that motion, the district court, on its own initiative, requested briefing on whether a stay should be entered in light of this Court's orders in *Gill v. Whitford*, No. 16-1161. J.S. App. 1a-2a.

5. After oral argument on the preliminary injunction motion and the appropriateness of a stay, the district court denied the request for preliminary injunction and entered a "stay pending further guidance" from this Court's disposition of *Gill*. J.S. App. 2a. The district court expressly declined to dispose of the parties' fully briefed cross-motions for summary judgment or plaintiffs' request to accelerate the trial on the merits under Rule 65(a)(2). J.S. App. 2a n.1.

a. The majority of the three-judge court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. J.S. App. 2a (parentheses and emphasis in original). The district court explained that the plaintiffs can succeed on the merits of their claim "*only* if" they prove "Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact. . . ." J.S. App. 25a (emphasis in original). To confirm the plaintiffs' own understanding that this is indeed their burden, the district court quoted the following excerpt from their briefing: "[O]ur burden is to show that the purposeful dilution of

Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016." J.S. App. 25a (brackets in original).

The district court stated it was "not yet persuaded" that plaintiffs are likely to succeed in carrying their burden of proving that it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." J.S. App. 17a (parentheses in original). The majority deemed this showing of causation indispensable because, "if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." J.S. App. 24a. That is, "[i]f the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*." J.S. App. 25a (emphasis in original).

b. In denying the preliminary injunction, the district court made "preliminary" findings (J.S. App. 6a), which included the following: After enactment of the plan, "a plurality (44.8%) of voters in the Sixth District were registered Democrats, while 34.4% of voters were registered Republicans," and "20.8% of voters were registered with neither major party." J.S. App. 19a-20a. In the 2012 congressional election, the first held under the 2011 redistricting plan (and the same general election that resulted in approval of the plan), "Democrat John Delaney defeated incumbent Republican congressman Roscoe Bartlett by a 20.9% margin." J.S. App. 20a. "However, in the U.S. Senate election

conducted that same cycle, Democrat Ben Cardin carried the Sixth District by just 50% of the vote, despite winning 56% of the vote statewide." *Id.*

The district court also found that Bartlett had "underperformed the other seven members of Maryland's congressional delegation in fundraising leading up to his defeat in the 2012 election." J.S. App. 21a. In addition, the district court found facts showing that the 2014 election results further demonstrated the complex and variable views of the Sixth District's electorate. That is, "Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District" and "operated at a financial disadvantage vis-à-vis Delaney," and in the same election, "Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points." J.S. App. 21a.

6. On August 25, 2017, the plaintiffs filed a notice of appeal of the order denying a preliminary injunction. That interlocutory order is the only ruling properly before this Court under 28 U.S.C. § 1253.

ARGUMENT

I. The Three-Judge District Court Appropriately Exercised Its Discretion in Denying Plaintiffs' Belated Preliminary Injunction Motion.

"'An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion.'" *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 409 U.S. 1207, 1218 (1972) (quoting *United Fuel Gas Co. v. Public Service Comm'n*, 278 U.S. 322, 326 (1929)); *see also Railway Express Agency v. United States*, 82 S. Ct. 466 (1962) (Harlan, J., in chambers). Faced with a preliminary injunction motion filed 3½ years after the case commenced, and 5 years after enactment of the challenged statute, the district court would have acted well within its discretion if it had opted to deny the injunction based solely on its tardiness. But even with the benefit of a protracted period of discovery that preceded their motion for preliminary relief, plaintiffs were unable to provide sufficient evidence that the electoral losses of their preferred candidates resulted from the enactment of the 2011 redistricting plan. Instead, the plaintiffs resorted to insisting (Dkt. No. 177-1, 33) that they were free to disregard the three-judge court's earlier opinion imposing on them the burden to prove "but-for" causation. J.S. App. 103a, 104a. They accented the disavowal of their burden of proof with late-breaking attempts to introduce sociological statistics with no expert witness

analysis. Dkt. No. 191, 12-13. Given these deficiencies in the record plaintiffs produced in support of their request for relief, the three-judge court's denial was anything but "improvident." *SCRAP*, 409 U.S. at 1218. The three-judge court's conclusion, supportable on multiple bases, should be affirmed.

A. The Plaintiffs Failed to Provide Any Evidence That Maryland Decisionmakers Caused Them Any Constitutionally Cognizable Harm.

Having failed to come forward with evidence to carry their burden, plaintiffs now disclaim the necessity to do so. They alleged in their second amended complaint that " 'but for the cracking of the district under the Plan,' 'Republican voters in the former [Sixth] District would have been able to elect a Republican representative in 2012 and 2014.' " J.S. App. 110a-111a. As noted by the three-judge court, plaintiffs further acknowledged in their filings, " '[O]ur burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016.' " J.S. App. 25a. But even after the benefit of seven months of discovery, plaintiffs could not provide evidence to meet this acknowledged burden. J.S. App. 26a-27a. Before this Court, plaintiffs now seek to shirk the evidentiary burden the three-judge court imposed, the same burden that plaintiffs themselves previously recognized as theirs to bear. They specifically deny (J.S. 24-27, 29) that the injury they

must prove is the "demonstrable and concrete adverse effect" identified by the three-judge court, both in its ruling on the motion to dismiss (J.S. App. 106a-107a) and its ruling on the motion for preliminary injunction (J.S. App. 17a, 22a, 25a), namely, that the legislature's alleged intentional partisan "vote dilution" in drawing the Sixth District's boundaries "has actually altered the outcome of an election" (J.S. App. 107a; *see* J.S. App. 24a ("[I]n the redistricting context, the government's 'action' is only 'injurious' if it actually alters the outcome of an election (or otherwise works some tangible, measurable harm on the electorate.)")). Instead, plaintiffs have resorted to a new formulation that diminishes their burden to proving some unspecified level of "vote dilution," a term that they have steadfastly refused to define, quantify, or situate in the context of a partisan gerrymandering claim. J.S. 26.

Tellingly, plaintiffs have proffered no social-science measure, or data supported by expert explication, describing the extent to which they allege their votes were diluted. J.S. 21-22; 24-28. Also absent from plaintiffs' repeated cries of "vote dilution" is any explanation of "social and historical conditions" in Maryland or the Sixth District that would cause inequality in the ability of Democrats and Republicans to elect their preferred representatives. *Contrast Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (vote dilution impermissible when it "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."). And unlike in *Whitford v. Gill*, there is no

assertion in this case that a minority can subvert the will of the majority under the Maryland 2011 congressional map. *Whitford v. Gill*, 218 F. Supp. 3d 837, 902 (D. Wis. 2016). The plaintiffs' allegation of vote-dilution injury is really no more than a complaint that "each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers," but what the Constitution requires is that each *individual* have an equally weighted vote. *Vieth v. Jubilerer*, 541 U.S. 267, 290 (2004) (plurality op.). A mere change in a district's population, when the one-person one-vote mandates have been fulfilled, cannot support a constitutional harm.

An examination of the electoral circumstances at work in the 2012 election demonstrates that plaintiffs' real complaint is that their preferred candidate did not win as he had in the past, but that individual candidate's loss is not traceable to any government action.

First, although the change in the Sixth District's borders resulted in a plurality of registered Democrats residing within the district, 20.8% of district residents claimed no major party affiliation. J.S. App. 19a-20a. Plaintiffs' experts offered no analysis concerning the voting preferences or behavior of this significant group of unaffiliated voters. Dkt. 186-41, 50:3-12.

Second, although challenger Democrat John Delaney prevailed in the 2012 congressional election, then-incumbent Congressman Bartlett's fundraising efforts underperformed all other members of the

Maryland congressional delegation, including Republican Andy Harris. J.S. App. 21a.

Third, results from other races in 2012 and from the 2014 election, including incumbent Congressman Delaney's mere 1.5% margin in the 2014 election, demonstrate that Republicans still enjoy electoral successes and the possibility of success within the Sixth District. J.S. App. 20a-21a.

Fourth, not all of the changes in the district's boundaries and attendant reassignment of populations resulted from an intention or purpose specific to the Sixth District. Some borders of the Sixth District resulted from legislative choices to eliminate the Chesapeake Bay crossing in the First District and to confine the Fourth District to Prince George's County. If one considers only the interchange of population between the former Sixth District and the former Eighth District, there was a combined net change of 58,486 registered Republicans moved out of and registered Democrats moved into the former Sixth District. Dkt. 177-19, 13. That number of net reassigned voters is smaller than the 64,608 votes that separated candidates Delaney and Bartlett in the 2012 election. *Id.*; Dkt. 186-31, 2.

Plaintiffs have never presented evidence of "the feared inequity" that they allege arose as a concrete result of the 2012 election. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (Kennedy, J.) (hereinafter "*LULAC*"). Plaintiffs have instead relied on a talismanic recitation of the phrase

"vote dilution" (J.S. 26), with no suggestion of how it might be quantified or, if it could be measured, what amount of vote dilution would "'be more than *de minimis* or trivial'" (J.S. App. 103a (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000)).

Plaintiffs offered no retrospective analysis of any election results in the Sixth District and no analyses at all of the voting behavior of former residents of the Sixth District who now reside in the Eighth District (a group including several of the plaintiffs). Because of the myriad complicating factors discussed above, plaintiffs' reliance on raw population numbers cannot support any claimed vote dilution. The only other showing made by plaintiffs with regard to their conception of vote dilution consisted of the Cook's Partisan Voting Index ("PVI") and the National Committee for an Effective Congress's Democratic Performance Index ("DPI") metrics.[3] Each of these two metrics, using

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[3] Plaintiffs state that these two metrics "rely on regression models of voter history." J.S. 12. To describe something as a "regression model" is to imply that some variable is predicted from other, known, variables. *See* "Regression" Merriam-Webster.com, accessed October 16, 2017, https://www.merriam-webster.com/dictionary/regression ("a functional relationship between two or more correlated variables"). But there is no evidence to support the proposition that either of plaintiffs' proffered metrics is predictive rather than descriptive; the portions of deposition cited by plaintiffs reveal only that voter history is one component of the unknown model for DPI. *See* J.S. 12. PVI was described by plaintiffs below as "calculated by comparing the district's average Democratic or Republican Party's share of the two-party presidential vote in the past two presidential elections to the nation's average share of the same." Dkt. 177-51, 2. Moreover, no evidence in the record suggests that any Maryland decisionmaker created

different methods, attempts to describe the partisan characteristics of a district by using results of past elections. While plaintiffs also offer ranges of likelihood in future elections to accompany the metrics at pages 12 and 13 of their jurisdictional statement, there is no evidence that these predictive values were considered by state decisionmakers. Moreover, these ranges of likelihood were not introduced below until they appeared in an attachment to plaintiffs' reply in support of the motion for preliminary injunction (Dkt. 191-8). These alleged changes in likelihood values fail to describe what actually happened in the Sixth District in the 2012 election. Thus, these statistics represent nothing more than assertions of allegedly "unfair results that would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (Kennedy, J.).

Even plaintiffs' own metrics of hypothetical results fail to demonstrate real harm. In the run-up to the 2012 election, at least nine Republicans held seats in districts with PVI and DPI metrics similar to the Sixth District or with an electorate that leaned even more Democratic. Dkt. 186-1, 35; Dkt. 177-52, 4. And plaintiffs' myopic reliance on predictive metrics ignores the myriad election-specific factors that influence voters. In 2012, Congressman Delaney's margin of victory over Roscoe Bartlett was 20.9%, a decisive

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any regression models that *used* these measures, unlike the record evidence in *Whitford v. Gill*, where the state defendants used regression models to make custom predictions of draft district performance in an effort to maximize partisanship. 218 F. Supp. 3d at 847-52.

victory not consistent with the predicted competitive nature of the district. In that election, Congressman Delaney won Washington County, which was part of both the former and current Sixth District and which had been carried by Roscoe Bartlett in the prior 10 elections.[4] Dkt. 186-31, 2; 186-28, 2. The plaintiffs simply make no effort to explain the extent to which the 2012 election results reflected a changing political landscape in Western Maryland, including an increasing number of Democratic voters in Frederick County. Dkt. 186-1, 14-16 (collecting evidence).

Nor do plaintiffs offer any analysis of the 2014 election, in which Congressman Delaney's margin of victory over a lackluster candidate was narrowed to a mere 1.5%, and a Republican candidate for Governor received well over 50% of votes cast in the Sixth District. As the three-judge court noted, if an electoral loss is not attributable to "constitutionally suspect activity," but "is instead a consequence of voter choice, that is not an *injury*. It is *democracy*." J.S. App. 25a (emphasis in original). The three-judge court acted well within its discretion in declining to find a likelihood of success on the merits where plaintiffs provided no evidence

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[4] For the first time, plaintiffs have raised election results that occurred in Carroll County, which was part of the former Sixth District. J.S. 28 n.2. This evidence was not presented to the three-judge court, and plaintiffs have continued to offer no evidence or analysis to suggest that Carroll County's removal from the Sixth District resulted from any reason other than the neutral decisions of the legislature to eliminate the Chesapeake Bay Bridge crossing and consolidate the territory of the Fourth District.

that changes in the Sixth District caused Congressman Bartlett's electoral loss in 2012.

Political participation has also suffered no chilling effects in the Sixth District since the 2011 map was adopted. Republican registration uniformly increased in the counties contained in both the former and current Sixth District and general election turnout among Republicans increased in some years and outpaced Democratic turnout in all years.[5] Dkt. 186-1, 48 (collecting evidence). All of the plaintiffs testified that they were undeterred from voting or actually *increased* their political activity as a result of the 2011 redistricting map. *Id.* at 45-46. The only testimony to the contrary was appropriately disregarded because it is inadmissible hearsay describing conversations with non-witnesses as recounted by one of the plaintiffs. Dkt. 177-53, 61:2-64:2.

The absence of any chilling effect is also supported by logic. Where a single seat is no longer secured for one party, but is instead newly competitive, expressive electoral activity, including voting, has potential reward. The change, even in likelihood, from a sure-thing Republican district to a "likely" Democratic district distinguishes the Sixth District's electoral context entirely from that of the Wisconsin legislature. In Wisconsin, there was record evidence that even when

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[5] It is entirely unclear how turnout in Republican primaries is relevant to the question of chilling. J.S. 13. The alleged expressive conduct at issue in this case, as far as may be discerned, is expressed support for Republican candidates in general elections.

Democratic voters actually secured the statewide vote majority they saw little electoral gain. *Whitford*, 218 F. Supp. 3d at 901. Such an environment might support chilling, because increased efforts to vote would not yield results. In contrast, one would reasonably expect that when faced with a competitive but winnable district, residents will expend effort to support their preferred candidate because of the possibility of electoral success, even if a win is no longer guaranteed. The increase in the district's competitiveness effectively means that each person's vote matters more than it did in elections held in the former Sixth District, when general election results tended to be a foregone conclusion. Because the Sixth District's competitiveness *increased* under any measure, plaintiffs' unsubstantiated claim of chilling defies logic. There is no reason to believe that the reapportionment of the Sixth District chilled the free speech of any reasonable person. The three-judge court was well within its discretion in finding that plaintiffs had not proved likelihood of success on the merits.

B. The Three-Judge Court Appropriately Assigned Plaintiffs the Burden to Prove "But-for" Causation.

Plaintiffs were correctly required to prove a "palpable and concrete harm" by demonstrating that the alleged State conduct "has actually altered the outcome of an election." J.S. App. 106a, 107a. "[I]f an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter

choice, then no injury has occurred." J.S. App. 24a. In the opinion denying the State's motion to dismiss and articulating the standard plaintiffs were required to prove, the three-judge court's majority relied on *Hartman v. Moore*, 547 U.S. 250 (2006), which dealt with complex "but-for" causation scenarios. J.S. App. 103a (quoting *Hartman*, 547 U.S. at 260, 256). The district court's opinion made no mention of the burden-shifting framework set forth in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). J.S. App. 103a. In the ruling denying plaintiffs' motion for preliminary injunction, the three-judge court's majority correctly recognized that *Mt. Healthy* did not contemplate a case where injury was not conceded, there were multiple decisionmakers, and there were multiple causes at work. J.S. App. 24a.

A departure from *Mt. Healthy* was appropriate in this case because the causal link between "retaliatory animus and the plaintiff's injury is . . . more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. In *Mt. Healthy*, only one government decision by one governmental body was at issue: the school board's decision whether to fire a teacher who engaged in both protected speech and unacceptable conduct. *Mt. Healthy*, 429 U.S. at 282-83. In *Hartman*, this Court considered whether *Mt. Healthy*'s framework could properly be applied where those who made the operative decision at issue are not defendants to the litigation, and the Court concluded that *Mt. Healthy* could not be so applied. *Hartman*, 547 U.S. at 259-66. When a constitutional tort requires proving

"retaliatory animus of one person and the action of another," *id.* at 262, additional work is required to address the complexity "specifically" by "defining the elements of the tort," *id.* at 265.

Redistricting presents just such a scenario of complex causation. "When the actor is a legislature and the act is a composite of manifold choices," "[e]valuating the legality of acts arising out of mixed motives can be complex." *LULAC*, 548 U.S. at 418 (Kennedy, J.). The 2011 congressional redistricting process involved multiple decisionmakers, including the Governor; legislators; staff; stakeholders; United States congressional representatives and their consultants and staff; and, ultimately, the Maryland citizens who participated in a referendum on the 2011 plan, by voting in the 2012 election. This diverse group engaged in multiple decisions that culminated in the ultimate shape of Maryland's 2011 redistricting map, from choosing which district boundaries required adjustment, to determining which neighborhoods should be allocated to adjoining districts.

Narrowing the inquiry to a single district does nothing to eliminate the complexity because the configuration of a single district, in this case the Sixth District, is determined only at the conclusion of this multi-stage, multi-actor decisionmaking process. In the 2011 process, the Sixth District's boundaries were impacted by, among other things, the decision to eliminate a bridge-only crossing of the Chesapeake Bay that had been introduced to the map in the 1991 redistricting

cycle (*e.g.*, Dkt. 186-2, 72:7-8), and requests from African-American constituents concerning the configuration of the Fourth and the Eighth Districts, *Fletcher*, 831 F. Supp. 2d at 902. "[A]ffixing a single label" of intent to those acts of redistricting is "hazardous," *LULAC*, 548 U.S. at 418 (Kennedy, J.), because it obscures the valid projects of the legislature in enacting its "conclusions about the proper balance of different elements of a workable democratic government," *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting).

As discussed further below, the three-judge court erred in finding a First Amendment retaliation claim justiciable in the redistricting context. However, in setting forth the claim it had identified, the three-judge court appropriately "defin[ed] the elements of the tort," *Hartman*, 547 U.S. at 265, to impose on plaintiffs a burden of proof that their preferred candidate "would have won reelection in 2012 had the prior map remained intact." J.S. App. 25a.

C. Additional Reasons Support Denial of the Preliminary Injunction.

The three-judge court correctly concluded that there are "serious doubts about whether Plaintiff's alleged injury is likely to recur." J.S. App. 27a. Not only did Congressman Delaney nearly lose "control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations," *id.*, but Delaney has subsequently announced he will not seek reelection, leaving the Sixth District

an open race in 2018.[6] According to a recent report, Republicans believe they have a good chance of winning the election to fill the seat vacated by Delaney.[7] If the alleged harm (plaintiffs' inability to elect their preferred Republican candidate) is unlikely to recur, there is no future harm to remedy and an injunction should not issue. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (injunction appropriate only where plaintiff is "likely to suffer irreparable harm before a decision on the merits can be rendered") (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed. 1995)).

In addition to the lack of impending harm, it would have been just as appropriate for the three-judge court to conclude that denial of the requested relief was warranted by plaintiffs' own delay in bringing suit and even longer delay before seeking a preliminary injunction. Plaintiffs' motion for preliminary injunction involved the same "factors militating against

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[6] Bill Turque & Jenna Portnoy, "Rep. John Delaney Is Running for President in 2020," Washington Post (July 28, 2017), https://www.washingtonpost.com/local/md-politics/rep-john-delaney-to-give-up-seat-wont-run-for-governor-weighs-white-house-bid/2017/07/27/32f4cb9a-714a-11e7-8839-ec48ec4cae25_story.html?utm_term=.2bac2bf95af1.

[7] Jenna Portnoy, "GOP Sees Rare Pick Up Opportunity in Maryland, with Open Seat in Purplish District," Washington Post (Oct. 23, 2017), https://www.washingtonpost.com/local/md-politics/gop-sees-rare-pick-up-opportunity-in-maryland-with-open-seat-in-purplish-district/2017/10/23/31c71770-b432-11e7-a908-a3470754bbb9_story.html?utm_term=.d2828f1b3f8b.

the extraordinary relief sought" that Justice Marshall cited in denying a request for court intervention in an election, after a three-judge court had denied the relief due to laches. *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., denying application for relief submitted to him as circuit justice). As was true in *Fishman*, plaintiffs here "delayed unnecessarily in commencing this suit" to challenge a statute that was no longer "a new enactment" but one that had been "utilized . . . before" in a previous election, so that plaintiffs "could have sued earlier." In this case, the plaintiffs compounded the consequences of their delayed filing of the complaint by waiting another 3½ years after suit commenced before requesting a preliminary injunction. Moreover, just as in *Fishman*, "an injunction at this time," after three elections under the 2011 plan, and so close to the beginning of the next election cycle, "would have a chaotic and disruptive effect upon the electoral process." *Id.* These circumstances amply justify denial of plaintiffs' request for preliminary relief.

Other lower courts have reached a similar conclusion, based on the reasonable inference that a plaintiff's delay in seeking a preliminary injunction evidences a lack of irreparable harm, even when First Amendment claims are asserted, and even when the delay was a matter of weeks or months. *See Preston v. Bd. of Trs. of Chicago State Univ.*, 120 F. Supp. 3d 801 (N.D. Ill. 2015); *Doe v. Banos*, 713 F. Supp. 2d 404 (D.N.J. 2010), *aff'd on other grounds*, 416 F. App'x 185 (3d Cir. 2010); *Utah Gospel Mission v. Salt Lake City*

Corp., 316 F. Supp. 2d 1201 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005); *Shady v. Tyson*, 5 F. Supp. 2d 102 (E.D.N.Y. 1998).

The three-judge court also would have acted well within its discretion to deny the preliminary injunction on the basis that the balance of equities tipped in favor of the state defendants or that denial was in the public interest. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The 2011 redistricting plan was not only duly enacted but has also been upheld in a referendum vote, gaining majority support in Allegany, Washington, and Frederick Counties, all of which were within the former Sixth District. Dkt. 186-8, 31. Moreover, plaintiffs sought an injunction on a timeline that would have required that the State expend considerable resources to draw a new congressional plan, pass the plan through the General Assembly in a special session, and have it signed into law by the Governor within two months. J.S. App. 31a. After missing the plaintiff-imposed deadline for decision on the motion, the three-judge court reasonably declined to enter a preliminary injunction when, "as a practical matter, the Court would have been unable to cure any constitutional ill in advance of the 2018 midterms even had it scheduled a trial at the earliest opportunity." J.S. App. 32a.

II. The Plaintiffs' Claims Are Non-Justiciable.

A. Plaintiffs' First Amendment Retaliation Claim Is Non-Justiciable in the Context of Congressional Redistricting.

Plaintiffs' proposal to import standards for First Amendment retaliation into the redistricting context provides no "limited and precise rationale" capable of correcting "an established violation of the Constitution." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). The three-judge court's majority pronounced that "the well-established standards for evaluating ordinary First Amendment retaliation claims can also be used for evaluating claims arising in the redistricting context." J.S. App. 102a. Under the district court's conception of "the First Amendment's retaliation prohibition," the government "may neither penalize a citizen nor deprive him of a benefit because of his constitutionally protected speech and conduct." *Id.* (citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74-76 (1990) (other citation omitted)). In addition to failing to prove any such deprivation, plaintiffs have also failed to provide any judicially manageable method for applying that standard to a case involving a generally applicable act of the legislature with difficult-to-discern effects.

The three-judge court and the plaintiffs have failed to address key questions which, when squarely posed, reveal that the First Amendment retaliation standard is no more judicially manageable than Equal Protection Clause standards this Court has rejected when used to address political gerrymandering claims.

First, what is the constitutionally protected speech at issue? Plaintiffs and the three-judge panel have not specified whether it is political affiliation, such as registration as Democrat or Republican, or voting history, such as whether there is a history of voting for a Democrat or Republican candidate.

The answer to the question of what constitutes the protected speech matters in the retaliation context because, in a successful First Amendment retaliation claim, the governmental actor knows about, considers, and then acts expressly *because of* the conduct. But there is an important practical limit at work in applying this standard to a redistricting case: an individual's voting history is *unknowable* by the government.[8] Registration does not convey that knowledge; people do not necessarily vote for the candidate of the party for which they have registered. *Vieth*, 541 U.S. at 288 (plurality op.) (It "is assuredly not true" that "the only factor determining voting behavior at all levels is political affiliation."). If registration determined voting history, Governor Larry Hogan, a Republican, could not have been elected in Maryland, where registered Democrats outnumber registered Republicans by nearly 2:1.

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[8] Even in a context where voting is conducted publicly – a city council session – this Court has concluded that "the act of voting symbolizes nothing," it is not "an act of communication," and "the fact that a nonsymbolic act is the product of deeply held personal belief – even if the actor would like it to convey his deeply held personal belief – does not transform action into First Amendment speech." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126-27 (2011).

Election results also do not convey knowledge of an individual voter's voting history. The smallest geographic unit for which election results are known and reportable is the precinct. Md. Code Ann., Elec. Law § 11-402(a), (d)(1)(i).[9] Therefore, statistics based on registration and election results do not convey to government actors the knowledge of protected speech that is a necessary predicate for a retaliation claim.

Second, how has the government penalized a citizen or deprived him of a benefit by placing him within or without a district? Is the "dividing by district lines and combining within them [that] is virtually inevitable and befalls any population group of substantial size" inherently harmful in some yet-to-be defined way? *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994) (discussing the problems with defining vote dilution in single-member districts, where there is no mathematical difference in voting weight). No court had ever reached that conclusion, prior to the decision of the three-judge court below. Without such a harm, a retaliation claim cannot succeed. In other First Amendment retaliation cases, the harm that befell the plaintiffs was the result of a government action taken against only the named plaintiffs, and the concrete, injurious nature of the retaliatory government action was

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[9] Absentee voting is not reportable at the precinct level in Maryland. Md. Code Ann., Elec. Law § 11-402(b). The State Board of Elections also does not report results at the precinct level for early voting and provisional ballots. State Board of Elections, "Using Election Data Files," http://www.elections.state.md.us/elections/using_election_data_instructions.html (last accessed October 12, 2017).

understandable apart from any First Amendment context. *E.g.*, *Crawford-El v. Britton*, 523 U.S. 574 (1998) (retaliation by destroying plaintiffs' property in government custody); *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996) (retaliation by terminating government contract); *Rutan*, 497 U.S. at 79 (retaliation by deprivation of "promotion, transfer, recall, and hiring"). Here, by contrast, the alleged injury of "vote dilution," occurs by direct operation of a statute of general application that directly affects all Maryland residents in the same way. No one has claimed that the statute constitutes "any direct abridgement of speech," because no one has identified a direct "burden on protected expression" that resulted from its enactment. *Meese v. Keene*, 481 U.S. 465, 480-82 (1987).

Merely recasting the claim semantically as a First Amendment retaliation claim, when the true nature of harm is not recognizable as an independent, indirect injury, does nothing to avoid the problems that arise when the alleged harm is viewed as an asserted "direct abridgement of speech." *Meese*, 481 U.S. at 482. The three-judge court recognized that treating plaintiffs' alleged "vote dilution" as a direct injury might privilege the status quo ante, and thereby ensure that past gerrymanders would be perpetuated. *See* J.S. App. 107a-108a. Though the court denied that its framing of a First Amendment retaliation claim would create "a presumption of fairness of the status quo ante" (J.S. App. 107a), the court's analysis does privilege the group of residents who have enjoyed "past electoral

success in that district" (*id.*) by conferring on them a potential claim that any change in the district's status quo constitutes retaliation against them. That kind of preference for members of one partisan group cannot be reconciled with this Court's guidance to date. As the *Vieth* plurality recognized, "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," 541 U.S. at 294 (emphasis in original).

The lack of care in specifying the standard threatens to curtail state legislative discretion beyond anything that this Court has previously endorsed. The Constitution "leaves with the States primary responsibility for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Serious, often difficult choices must be made in apportionment.

Among these legislative choices is whether to seek ways of making districts more, rather than less, competitive. The choice between more competitive districts or less competitive districts can have the effect of *diluting the votes of subpartisan groups*, such as radical and moderate wings of the same political party. *Vieth*, 541 U.S. at 288. Plaintiffs' argument that "vote dilution" in itself, as signified by a diminution in the predictive metrics they identify, suffices to prove retaliatory intent and harm therefore produces incongruous results. Republicans who identify as more moderate in their views, for example, may have had their votes diluted under past configurations of the Sixth District and therefore welcome the new plan no less

than the district's Democrats do. The fluidity of American political identification and ideological alignment ensures that any line-drawing in this arena will inevitably result in winners and losers potentially unseen or unimagined by the courts and litigants engaged in any particular conflict.

Another effect of adopting plaintiffs' standard would be to render it constitutionally impermissible for a legislature to value competitive districts and to reapportion in ways that make previously uncompetitive districts less so. Rather, under plaintiffs' preferred regime, legislatures would be condemned to perpetuate a district's uncompetitive conditions indefinitely, and would be prevented from increasing its competitiveness even marginally, once an uncompetitive district has been established. Under plaintiffs' theory, it would be proof of an unconstitutional, retaliatory intent *if* (1) a legislature intended to increase competitiveness by shifting a district to a composition that predicted a Republican victory but remained in the competitive range, *and*, as is certainly possible, (2) an election in the newly drawn district is subsequently won by a Democrat. That standard is simply too easy for a claimant to satisfy; if it were adopted, legislatures would be discouraged from ever choosing to foster competitive elections by, for example, shifting district boundaries across the map to increase the political diversity of each district. Nothing in the Constitution precludes State legislatures from prioritizing competitiveness of districts. On the contrary, this Court has repeatedly emphasized that the Constitution commends

to state legislatures the weighing of competing concerns in the "highly political task" of redistricting, subject to requirements enacted by Congress. *Growe*, 507 U.S. at 33; *see Vieth*, 541 U.S. at 285 (plurality op.). But plaintiffs' standard is offended by a legislature's grappling with such "considerations [that] are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Plaintiffs' standard is both unmanageable and constitutionally suspect, because it would thwart any state legislature's efforts to exercise its best collective judgment of what democracy requires, even when, as in this case, such legislative action occurs at the express urging of constituents.

B. The Three-Judge District Court Opinion Demonstrates That the Standard Is Not Manageable.

The three-judge court concluded that it would need "evidence of a sufficient quantity to demonstrate *how* and *why* voters who would have been included in a neutrally drafted Sixth District voted in the 2012, 2014, and 2016 elections." J.S. App. 26a. The three-judge court speculated that such evidence might take the form of "voter sampling or statistical data" or "affidavits." *Id.* But the very idea that the standard demands such evidence demonstrates that it is not judicially manageable. In the first instance, it is unclear *who* these hypothetical voters would have been voting for. Is it a theoretical repeat of the match-ups the actual Sixth District yielded? Such questions

would be purely speculative – it is altogether unclear whether, for example, John Delaney would have chosen to run in a differently configured Sixth District, or whether he or even Roscoe Bartlett would have succeeded in the primary. *See* Dkt. 186-1, 28 (discussing electoral circumstances of that race). Assigning hypothetical residents based on actual votes cast in the elections that took place in their districts would be just as inappropriate, as explained by plaintiffs' expert Dr. Michael McDonald, because the different U.S. House districts "did not have similar electoral circumstances." Dkt. 177-19, 17.

Moreover, the three-judge court's analysis offers no guidance as to what criteria "a neutrally drafted Sixth District" would need to fulfill in order to earn the moniker "neutrally drafted." Not only is guidance missing from the opinion, but it is unclear how guidance about a neutrally drafted district could ever be developed without specifying how much partisanship is too much. No such specification has been made by the three-judge court or the plaintiffs below.

Even if any of these hard questions could be answered (and it appears that they may be unanswerable), there remain significant practical problems in producing the evidence requested by the three-judge court. There were more than 350,000 individuals who resided in the former Sixth District and were assigned to other districts in the 2011 redistricting process. Even assuming that any "neutrally drafted Sixth District" would concern only the division between the current Sixth District and the current Eighth District,

145,984 people were moved from the former Sixth to the current Eighth District. Dkt. 177-19, 13. To find answers to any of the above questions, thousands of people would need to be interrogated about their past voting behavior, including potentially the content of their past votes. It is, at best, mere speculation to imagine that all such voters, or even a statistically significant sampling, would be willing to respond to an inquiry into their voting, and thereby forfeit the cherished confidentiality afforded by the secret ballot. *See Burson v. Freeman*, 504 U.S. 191, 200-06 (1992) (discussing adoption of Australian ballot).

The three-judge court was correct that the type of evidence needed to satisfy its articulated standard is nothing less than actual, concrete evidence of how voters might have voted absent whatever movement of district lines was brought about by whatever activity is deemed constitutionally impermissible. But the court below was incorrect in the original conclusion that its standard presented a judicially manageable, and therefore justiciable, claim. The three-judge court should have joined Judge Bredar's sole opinion that plaintiffs are unlikely to succeed on the merits of their claim because their claim is likely to be found non-justiciable, and therefore the motion for preliminary injunction was properly denied. J.S. App. 9a.

CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted,

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